Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

BULL MOOSE TUBE COMPANY, CAPARO, INC., AND BULL BOOSE TUBE LIMITED,

Petitioners,

v.

CHARLES E. EMMENEGGER AND ROBERT F. RITZIE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the harmless error doctrine, embodied in 28 U.S.C. § 2111 and Federal Rule of Civil Procedure 61, properly be applied to deny appellate relief to a party aggrieved by erroneous jury instructions on the premise that there was disputed evidence from which the jury, had it been properly instructed, could nevertheless have found against the aggrieved party?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners are Bull Moose Tube Company; Caparo, Inc.; and Bull Moose Tube Limited. Respondents are Charles E. Emmenegger and Robert F. Ritzie.

The parent corporation of Bull Moose Tube Company is Caparo, Inc. The parent corporation of Caparo, Inc. is Caparo Partners. The parent corporation of Bull Moose Tube Limited is Barton Group Limited. No publicly held company owns 10% or more of the stock of any of the Petitioners.

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Charles S. Capel, *The Irony of Harmless Error*, 51 Okla. L. Rev. 501 (1998) 11, 20

OPINIONS BELOW

The March 21, 2003 opinion of the United States Court of Appeals for the Eighth Circuit ("Eighth Circuit") is reported at 324 F.3d 616 (8th Cir. 2003), and is reprinted at App. 1a. The Eighth Circuit's order denying Petitioners' petition for rehearing and for rehearing *en banc* is reprinted at App. 32a. The December 19, 2001 opinion of the United States District Court for the Eastern District of Missouri ("District Court") following a jury verdict, returned on December 4, 2001, is reprinted at App. 21a; and the Amended Judgment entered by the District Court on January 7, 2002 is reprinted at App. 25a. The District Court's February 25, 2002 order denying Petitioners' motion for judgment as a matter of law or for a new trial is reprinted at App. 28a.

The District Court's July 20, 1998 opinion after the initial proceeding brought pursuant to federal ERISA law is reported at 13 F. Supp. 2d 980 (E.D. Mo. 1998). The Eighth Circuit's November 24, 1999 opinion affirming in part and vacating in part is reported at 197 F.3d 929 (8th Cir. 1999).

STATEMENT OF JURISDICTION

The Eighth Circuit issued its opinion on March 21, 2003. Petitioners' timely petition for rehearing and rehearing *en banc* was denied on April 30, 2003. This petition for a writ of certiorari is timely pursuant to Supreme Court Rule 13, in that Petitioners have filed it within 90 days of April 30, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), in that Petitioners seek review of a final judgment of the Eighth Circuit.

STATUTORY PROVISIONS INVOLVED

This Petition in part involves the application of 28 U.S.C. § 2111 and Federal Rule of Civil Procedure 61.

28 U.S.C. § 2111 provides:

> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Federal Rule of Civil Procedure 61 provides:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

STATEMENT OF THE CASE

I. Overview of the Case

On March 21, 2003, the Eighth Circuit affirmed the District Court's Amended Judgment, entered on a jury verdict partially in favor of Charles Emmenegger and Robert Ritzie on their claims against Bull Moose Tube Company, Caparo,

Inc. and Bull Moose Tube Limited (collectively "the Company") for compensation payable under a phantom stock plan. In so doing, the Eighth Circuit concluded that the District Court's refusal to give instructions defining "good faith"— a term that was central to the issues before the jury—did not prejudice the Company, and thus was harmless error. The Eighth Circuit reasoned that the Company's case "was not impaired" because there was disputed evidence from which the jury could nevertheless have found against the Company under the terms of the refused instructions. *App. 11a-12a.*

II. Background of the Case

Emmenegger, Ritzie and James Riley were three top managers of Bull Moose Tube Company ("BMT"). After BMT was acquired in 1988 by Caparo Industries, PLC, a British corporation, members of BMT senior management, including Emmenegger, Ritzie and Riley, negotiated and reached agreement with ownership on the Bull Moose Tube Company Phantom Stock Plan ("PSP"). The PSP served as an incentive to BMT management in the form of shares of "phantom stock," which were allocated to the PSP's participants, at no cost, and which assumed a fluctuating value based on a formula tied to BMT's earnings. *Trial Transcript, volume I ("Tr. v.1") at 39-40, 71-79; Tr. v.II at 116-20; Tr. v.III at 78; Defendants' Trial Exhibit ("Ex.") C-2.*

Under the terms of the PSP, if the employment of a participant was terminated without cause (as defined), the participant would be paid "redemption price" (a defined term, incorporating a specified formula tied to the company's performance) for his phantom shares. If the employment of a participant was terminated with cause, the participant would be paid "book value" (another defined term, incorporating a

separate formula, that would typically yield a lower price) for his phantom shares. *Ex. C-2; Tr. v.I at 53-6.*

Responsibility for administration of the PSP (as amended) was vested in the board of directors of Caparo, Inc. ("Caparo"), BMT's parent. The Caparo board was empowered to "issue rules, regulations or orders, adopt resolutions and make determinations relating to the [PSP], interpret the provisions of the [PSP] and supervise the administration of the [PSP]." *Ex. C-2.* As such, the parties agreed to confer upon the Caparo board the authority to determine whether a discharged participant was terminated with or without cause, and thus whether he should receive redemption price or book value for his phantom stock. The PSP expressly provided that "all decisions made by the [Caparo] Board *in the reasonable exercise of its discretion in good faith* shall be final, conclusive and binding on all persons, including the corporations, their stockholders and their officers." *Ex. C-2 (emphasis added).*

In the Spring of 1996, Emmenegger, Ritzie and Riley were discharged from employment with the Company. *Tr. v.I at 45; Tr .v.II at 29-30; Tr. v.IV at 133-35; Tr. v. VI 23-23, 30-31, 33-36, 99-101.* In accordance with the discretionary powers conferred upon it by the PSP, the Caparo board determined that Emmenegger and Ritzie were terminated with cause, thereby warranting payment of only book value for their phantom shares. *Ex. D-18.*

In support of that decision, the members of the Caparo board cited principally what they deemed to have been egregious misconduct by Emmenegger and Ritzie in effecting an unauthorized redistribution, to themselves and others, of phantom shares previously held by former employee Dave Lichtfuss ("the Lichtfuss shares"), and in concealing their

actions from Caparo. *Tr. v.V at 46-50, 53-4; Tr. v.VI at 31-34; Tr. v.VI at 99-101.* Emmenegger's and Ritzie's purported redistribution of the Lichtfuss shares was no small financial matter. By 1996, when participants were looking to cash in phantom shares, the disputed Lichtfuss shares had a value exceeding $1 million. *Tr. v.III at 99-100.*

In deciding to deny Emmenegger redemption price for his phantom shares, the Caparo board also cited its strong conviction that Emmenegger had engaged in serious impropriety by authorizing two payments totaling $50,000 to an entity that was not a party to an underlying land acquisition by BMT and whose principals were Emmenegger's friends, by failing to disclose those payments to Caparo, and by failing to explain the payments when they were later discovered and he was confronted about them. *Tr. v.V at 47-50; Tr. v.VI at 31-33, 99-100.*

The Caparo board also determined that none of the PSP participants, including Emmenegger, Ritzie or Riley, was entitled to any compensation for the Lichtfuss shares, because the purported redistribution of those shares had not been authorized. *Tr. v.VI at 22-27. 94, 109.*

III. Proceedings Below

Emmenegger, Ritzie and Riley (collectively "Plaintiffs") filed suit in the District Court. In the initial proceeding, Plaintiffs predicated jurisdiction in the District Court on 28 U.S.C. § 1331, asserting six claims under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 2001 *et seq.*: three counts (one by each plaintiff) for benefits under the PSP, which plaintiffs alleged was an ERISA plan; two counts (by Emmenegger and Ritzie) for compensation payable under a company severance policy, which plaintiffs alleged

was an ERISA plan; and one count (by all three plaintiffs) for retaliation for exercising their rights under the PSP. Supplemental jurisdiction, pursuant to 28 U.S.C. § 1367, was asserted as to five additional claims brought under state law, all of which the District Court dismissed prior to trial.

After a bench trial, the District Court entered judgment in favor of Plaintiffs on their ERISA claims. Defendants appealed. The Eighth Circuit vacated the judgment as to the PSP claims, on the basis that the PSP was not an ERISA plan, and dismissed those claims for lack of federal subject matter jurisdiction. The Eighth Circuit held that the severance-pay policy was an ERISA plan and affirmed the District Court's judgment as to the claims for severance pay. The case was remanded to the District Court.

In the second proceeding that followed, which gave rise to the issues presented in this Petition, Plaintiffs re-stated their PSP claims under state-law breach-of-contract theories. Plaintiffs predicated, and the District Court assumed, jurisdiction over their remaining claims on 28 U.S.C. § 1367, as supplemental to the federal-question jurisdiction over the severance claims that had been affirmed by the Eighth Circuit.

The Company had already paid Emmenegger and Ritzie book value for their phantom shares (excluding Lichtfuss shares), in the principal amounts of $569,433 and $184,228, respectively. In the second trial, Emmenegger and Ritzie were seeking to be paid an additional $3,739,252 and $1,348,591, respectively, representing the incremental amounts up to redemption price for their shares, and full redemption price for the Lichtfuss shares they claimed to have held (for which no payment had been made). The Company had already paid Riley full redemption price for his phantom shares, in the principal amount of $1,355,808. In the second

trial, Riley was seeking to be paid an additional $177,011, representing redemption price for the Lichtfuss shares he claimed to have held.

The Company disputed that any additional amounts were owed. The Company maintained that the Caparo board exercised its discretion reasonably and in good faith in determining that Emmenegger and Ritzie were terminated with cause, as defined under the PSP, and that they were not due redemption price for their phantom shares. In addition, the Company maintained that the Caparo board exercised its discretion reasonably and in good faith in determining that any purported redistribution of the Lichtfuss shares was unauthorized, and that none of the Plaintiffs was due any compensation for those shares.

The jury was asked to return a special verdict answering the following questions:

> 1. Was a redistribution of the Lichtfuss shares authorized in April of 1994?
>
> 2. Did the Caparo, Inc. Board of Directors fail to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Charles E. Emmenegger was terminated "with cause," as that term is defined in these instructions?
>
> 3. Did the Caparo, Inc. Board of Directors fail to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Robert F. Ritzie was terminated "with cause," as that term is defined in these instructions?

App. 34a.

Because the term "good faith" was central to the questions posed to the jury on Emmenegger's and Ritzie's claims (in questions 2 and 3), the Company tendered instructions (one for each claim) defining that critical term, as follows: "'Good faith,' as used in th[ese] instruction[s], means the state of mind denoting honesty of purpose, freedom from intention to defraud, and faithfulness to one's duty or obligation."[1] The Company had introduced evidence that the Caparo board acted in accordance with these criteria. However, the District Court refused to submit the instructions defining "good faith."

The jury answered "no" to the first question on the special verdict form, finding that Emmenegger's and Ritzie's purported redistribution of the Lichtfuss shares had been unauthorized. *App. 34a.* That verdict resulted in the entry of judgment against all three Plaintiffs for their Lichtfuss-share claims (and disposed of Riley's case entirely). However, the jury answered "yes" to the second and third questions, resulting in the entry of judgment in favor of Emmenegger and Ritzie on their claims for redemption price for their non-Lichtfuss shares, in the principal amounts of $3,621,245 and $1,171,579, respectively. *App. 35a, 25a.*

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[1] The refused instructions, numbered "9 Alt." and "10 Alt.," are reprinted at App. 38a-39a. The substance of the definition of "good faith" found in those instructions, which Plaintiffs did not challenge, followed applicable Missouri state-law authority. *See Missouri v. Russell*, 45 S.W.3d 487, 497 (Mo. Ct. App. 2001). The instructions given by the District Court to guide the jury in its responses to questions 2 and 3 on the verdict form, numbered "8" and "9," which omitted the definition, are reprinted at App. 36a-37a.

On appeal, the Company raised as prejudicial error the District Court's refusal to instruct the jury on the key concept of "good faith." However, the Eighth Circuit concluded that the Company's "case was not impaired" by the District Court's refusal to define the term, because "there was ample evidence that the [Caparo] board did not act with 'honesty of purpose' in firing Emmenegger and Ritzie with cause . . . " (quoting the terms of the omitted definition). *App. 12a.* Thus, the Eighth Circuit found the refusal of the "good faith" instructions to be harmless, because even if definitional guidance had been provided to the jury, there was disputed evidence from which the jury may have found against the Company in any event.

REASONS FOR GRANTING THE PETITION

This Petition involves an important question of federal procedural law on which the Courts of Appeals have taken conflicting approaches, and on which this Court has never provided substantial guidance—especially in the civil litigation context.

In cases like this one, where a federal court is applying state substantive law, the giving or denial of a jury instruction in federal court is governed by federal jurisprudence. *See Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1135 (8th Cir. 1989); *Ulmer v. Assoc. Dry Goods Corp.*, 823 F.2d 1278, 1284 n.3 (8th Cir. 1987).[2]

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[2] If federal law requires that an instruction be given in such a case, then the district court must give the instruction, but state law governs the substance of the instruction. *See Ulmer*, 823 F.2d at 1284 n.3.

It is important to emphasize, however, that this Petition does not require the Court to determine whether the District Court's refusal to give the instructions was erroneous in the first instance. The Eighth Circuit never directly addressed that issue. Rather, the Eighth Circuit implicitly assumed that the District Court's refusal was erroneous, but found that error to be harmless. *App. 11a-12a.*[3]

When a federal appellate court finds that a district court erroneously instructed or failed to instruct the jury, it is required to determine whether such error was harmless. Both 28 U.S.C. § 2111 and Federal Rule of Civil Procedure 61 require reviewing courts to determine whether an alleged error or defect affected "the substantial rights of the parties."[4]

Under the harmless error doctrine, "appellate courts all over the United States [are] carefully parsing over appeal-

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[3] The refusal of the proffered instructions was unquestionably erroneous. "[W]here terms are not readily understood by the jury or where the possibility of confusion concerning a term exists, the court should define or explain such a term." *U.S. v. Whitehead*, 176 F.3d 1030, 1040 (8th Cir. 1999) (quoting *Westborough Mall, Inc. v. City of Cape Girardeau*, 794 F.2d 330, 338 (8th Cir. 1986)). The Eighth Circuit has held that the term "good faith" is not a term of common usage which is readily understood by a jury. *See K.C. Power & Light Co. v. Ford Motor Credit Co.*, 995 F.2d 1422, 1430-31 (8th Cir. 1993). Therefore, it was error not to define that term, especially because it was central to the issues presented to the jury.

[4] This Court has previously recognized that 28 U.S.C. § 2111 "applies directly to appellate courts" and that "appellate courts should act in accordance with the salutary policy embodied in Rule 61." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984).

records and transcripts first to determine whether or not error or errors occurred at trial and then upon finding error, affirming" if the error is found to be harmless. Charles S. Capel, *The Irony of Harmless Error*, 51 Okla. L. Rev. 501, 504-05 (1998). "It is not uncommon for an appellate court to acknowledge multiple errors in a single trial and conclude each is harmless." *Id.* at 505.

The harmless error analysis employed by the Eighth Circuit in this case, however, departs radically from the approach taken by other Courts of Appeals. The Eighth Circuit's decision creates an intolerable standard that, if left uncorrected by this Court, will have far-reaching and troublesome consequences for litigants and lower courts. If allowed to stand, it would effectively eliminate any appellate review of jury instructions in all cases that involve disputed issues of fact.

I. Review Is Warranted Because The Harmless Error Analysis In The Eighth Circuit's Decision Conflicts With Decisions Of Other Circuit Courts On This Important And Recurring Matter Of Federal Procedural Law.

The Eighth Circuit held that the erroneous refusal of jury instructions was harmless error merely because there was disputed evidence from which the jury could have found against the proffering party had the refused instructions been given. That decision creates an irreconcilable conflict between the Eighth Circuit and other Circuit Courts, warranting review by this Court. *See* Sup. Ct. R. 10; *see also Desert Palace, Inc. v. Costa*, 123 S. Ct. 2148 (2003) (granting certiorari where Ninth Circuit's approach to "mixed motive" cases under Title VII conflicted with approach followed by a number of other Circuits).

Other Courts of Appeals have held the erroneous refusal of instructions to be reversible error, even though there was disputed evidence from which juries still could have found against the tendering parties had the instructions been given. *See, e.g., Jerlyn Yacht Sales, Inc. v. Wayne R. Roman Yacht Brokerage*, 950 F.2d 60, 69 (1st Cir. 1991); *Anderson v. Branen*, 17 F.3d 552, 558 (2d Cir. 1994); *Smith v. Borough of Wilkinsburg*, 147 F.3d 272, 281 (3d Cir. 1998); *Kroger Co. v. Roadrunner Transp., Inc.*, 634 F.2d 228, 230 (5th Cir. 1981); *Hisrich v. Volvo Cars of N. Amer., Inc.*, 226 F.3d 445, 452-53 (6th Cir. 2000); *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856-58 (7th Cir. 1992); *Gauthier v. AMF, Inc.*, 788 F.2d 634, 635-36 (9th Cir. 1986); *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1242-43 (10th Cir. 2002); *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1546-48 (11th Cir. 1996). It should not be surprising that these courts have not found it appropriate to articulate a specific rule against finding harmless error in these circumstances, because such a finding is so radical and unfounded. Nevertheless, the principle clearly is implicit in their decisions.

Moreover, the Eighth Circuit's approach, which resolved disputed factual questions in favor of the prevailing party, directly conflicts with the approach taken by other courts. *See, e.g., Caballero v. City of Concord*, 956 F.2d 204, 207 (9th Cir. 1992) ("In reviewing a civil jury instruction for harmless error, the prevailing party is not entitled to have disputed factual questions resolved in his favor because the jury's verdict may have resulted from a misapprehension of law rather than from factual determinations in favor of the prevailing party."); *U.S. v. Prigmore*, 243 F.3d 1, 21-22 (1st Cir. 2001) (failure to define central terms was reversible error because evidence on the issue was contested and appellate court is "not equipped to make the credibility determinations that must be made in choosing between these clashing blocs

of evidence, each of which is sufficient to render rational a finding in favor of its proponent").

The conflict now created between the Circuit Courts on this important issue can be highlighted by comparing the Eighth Circuit's approach in this case to the Seventh Circuit's approach in *Heller Int'l Co. v. Sharp*. In *Heller*, a company brought suit against its insurers to recover on a fidelity bond that insured the company against losses sustained due to dishonest and fraudulent acts by its employees, if that conduct was done "with manifest intent" to harm the company and to procure a financial benefit. *Heller*, 974 F.2d at 852, 855. The central issue for the jury was whether a vice president, who had engaged in a series of improper transactions, had acted with the requisite "manifest intent." *Id.* at 857. The Seventh Circuit held that it was reversible error for the trial court to refuse to instruct the jury on the meaning of "manifest intent," a term that was not defined in the bond itself, because the jury "could well have [been] left . . . with a mistaken impression about [its] meaning." *Id.* at 858. Therefore, the Seventh Circuit implicitly found that the company was substantially prejudiced even though there was evidence from which the jury could have found against the company under the terms of the refused instruction.

Similarly, in this case, the central question for the jury revolved around a contractual provision agreed to between the parties. The jury was asked to determine whether the Caparo board had failed "to engage in a reasonable exercise of its discretion *in good faith,*" a term that was not defined in the PSP. The refused instructions would have clarified that, in evaluating whether the Caparo board acted in "good faith," the jury should consider whether it acted with a "state of mind denoting honesty of purpose, freedom from intention to

defraud, and faithfulness to one's duty or obligation." *App. 38a-39a.*

Under the approach employed by other Circuit Courts, the jury in this case "should have been given the opportunity to weigh [the] evidence [of the Caparo board's good faith] and apply the [refused] instruction[s]." *Anderson*, 17 F.3d at 558. While the jury *could* have found against the Company had the refused instructions been given, as the Eighth Circuit held, the jury just as well *could* have found that the Caparo board's actions *did* meet the definition of "good faith" in the refused instructions. *See Smith*, 147 F.3d at 281. It is simply impossible to say how the jury would have evaluated the evidence if it had been given the proper criteria upon which to do so. *See Jerlyn Yacht Sales*, 950 F.2d at 69 ("[W]e cannot say that the jury would have found no breach of fiduciary duty had it been properly instructed."). Without any guidance on the meaning of the term "good faith," the jury was left to decide—incorrectly—that it could invalidate the Caparo board's decision merely if it disagreed with the decision. *See Gauthier*, 788 F.2d at 636 (finding reversible error because in the absence of refused instructions, jury may have incorrectly applied the evidence).[5]

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[5] Indeed, the prejudicial effect of the refused instructions is underscored by the "split" verdicts rendered by the jury in this case. The jury concluded that Emmenegger's and Ritzie's actions in effecting a redistribution of the Lichtfuss shares, ultimately worth more than $1 million, was *unauthorized.* It is not difficult to see how the same jury, had it been given a definition of "good faith," could have found that the Caparo board acted with honesty of purpose in concluding that Emmenegger's and Ritzie's costly actions constituted "cause" for termination and denial of full redemption price for their phantom shares under the PSP.

The Eighth Circuit's decision represents an unprecedented and unwarranted expansion of the harmless error doctrine beyond the construct applied by other Circuit Courts. If allowed to stand and flourish, the Eighth Circuit's approach would severely and unjustifiably limit the rights of parties, in all sorts of cases, to present their theories effectively. The Eighth Circuit's decision would not only affect cases involving refused instructions, but it would also affect cases involving erroneously-given instructions. The mere existence of disputed evidence from which a jury, properly instructed, *could* find against a party would effectively eliminate that party's remedy on appeal.

Under the Eighth Circuit's approach, if an erroneously-refused or erroneously-given instruction embodied a claim or defense, an aggrieved party would be able to demonstrate prejudice only in cases where there had been no conflicting evidence and the party had been entitled to judgment as a matter of law. If there was disputed evidence permitting a finding for either side on the claim or defense under the proper instructions, the Eighth Circuit's approach would require a finding of harmless error. Yet, parodoxically, if a party had been entitled to judgment as a matter of law, the matter of instructions should be moot because the case should not have been submitted to the jury at all. The result, therefore, would be virtually to eliminate any recourse for instructional error.

At the very least, the Eighth Circuit's standard, if left unaltered, would place reviewing courts in future cases in the untenable position of speculating about how juries would have evaluated disputed evidence. It is not the proper function of a "reviewing court [to] engage in pure speculation—its view of what a reasonable jury would have done" had it been properly instructed. *Sullivan v. Louisiana*, 508 U.S. 275, 281

(1993). Furthermore, grounded as it is on speculation rather than on a reasoned and discernible standard, such a regime would lead to widely inconsistent decisions – rendering confusion in the lower courts.

II. Review Is Also Warranted Because The Eighth Circuit Has Decided An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court, Regarding The Appropriate Standards For Harmless Error Review Of Jury Instructions.

The statutory mandate to apply harmless error review to trial errors, found in 28 U.S.C. § 2111 and Federal Rule of Civil Procedure 61, does not itself provide any guidance on how such review should be applied. Over time, as the federal appellate courts have addressed various types of trial errors, certain benchmarks have emerged. However, the issue presented by the Eighth Circuit's decision in this case has not been, but should be, definitively addressed by this Court.

The Court has previously addressed the harmless error question in a variety of contexts involving criminal proceedings. The Court's first reported case on the subject, *Bram v. U.S.*, 168 U.S. 532 (1897), was interpreted as having established a rule requiring automatic reversal in cases of constitutional trial error. In *Kotteakos v. U.S.*, 328 U.S. 750, 764-65 (1946), a case involving non-constitutional errors, the Court enunciated a harmless error standard requiring a determination as to whether the error "had substantial and injurious effect or influence in determining the jury's verdict." In *Chapman v. California*, 386 U.S. 18, 24 (1967), the Court ruled that even federal constitutional errors could be subjected to harmless error analysis, but the government had

to establish that the claimed error was harmless "beyond a reasonable doubt."

Following *Chapman*, "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless." *Arizona v. Fulminante*, 499 U.S. 279, 306-07 (1991) (citing cases). The Court has clarified that a constitutional error may be reviewed for harmlessness if it occurs during the presentation of evidence at the trial, but automatic reversal is required if it alters the basic structure of a trial—thereby creating a distinction between "trial errors" and "structural errors." *Id.* at 307-10.[6]

The Court has applied these principles to harmless error review of jury instructions. For instance, in *Rose v. Clark*, 478 U.S. 570, 579-82 (1986), the Court held that a jury instruction that erroneously placed the burden of proof on the issue of intent on the defendant was amenable to harmless error review. In *Sullivan*, the Court held that the failure of a trial court to properly instruct the jury on the meaning of the term "reasonable doubt" could not be subjected to harmless error review, and thus required automatic reversal. *Sullivan*, 508 U.S. at 279-82.

However, this Court has not specifically addressed the question presented here: Can an erroneously-refused or erroneously-given instruction be dismissed as harmless error

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[6] The Court has held that even constitutional errors are reviewed under the more lenient *Kotteakas* harmless error standard, rather than the more stringent *Chapman* standard, in habeas proceedings where the federal courts' review is collateral rather than direct. *Brecht v. Abrahamson*, 507 U.S. 619, 637-39 (1993).

simply because there is disputed evidence from which the jury *may* nevertheless have found against the complaining party, in the absence of the error? Indeed, while the Court has provided considerable guidance regarding harmless error review in the criminal context, the application of the doctrine in civil cases has remained largely unaddressed.

Perhaps not surprisingly then, the Courts of Appeals have developed varying articulations of harmless error review in civil cases. For instance, the Sixth Circuit has stated that the refusal of an instruction is reversible error if it "impairs the requesting party's theory of the case." *Hisrich*, 226 F.3d at 449 (quoting *Sutkiewicz v. Monroe County Sheriff*, 110 F.3d 352, 361 (6th Cir. 1997)). The Seventh Circuit will reverse if "the jury's understanding of the issues was seriously affected, to the prejudice of the [complaining party]." *Heller*, 974 F.2d at 856 (quoting *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 219 (7th Cir. 1983)). Other courts simply track the statutory language of 28 U.S.C. § 2111 and consider whether an erroneous refusal has affected a party's "substantial rights." *See, e.g., McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 924-27 (3d Cir. 1985); *Davet v. Maccarone*, 973 F.2d 22, 28 (1st Cir. 1992).

At the same time, the Circuit Courts have adopted divergent formulas for the amount of certainty required in order to make a harmless error finding in civil cases. For instance, in order to allow an erroneously-refused instruction to stand, the Ninth Circuit requires a finding that the error was "more probably than not" harmless. *See Caballero*, 956 F.2d at 206. The Third Circuit deems an error to be reversible unless it is "highly probable" that it was harmless. *See McQueeney*, 779 F.2d at 924-27. The Tenth Circuit will reverse if the jury's verdict "might" have been influenced by the error. *See Townsend*, 294 F.3d at 1242. The Fifth and

Eleventh Circuits will reverse due to an erroneous refusal if the charge as a whole leaves the court with a "substantial and ineradicable doubt" as to whether the jury has been properly guided in its deliberations. *See McCullough v. Beech Aircraft Corp.*, 587 F.2d 754, 759 (5th Cir. 1979); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (11th Cir. 1981). In many cases, the Courts of Appeals have not articulated any standard, appearing instead to find reversible error any time the erroneous instructions dealt with a central issue. *See, e.g.*, *Heller*, 974 F.2d at 856.

There is also confusion about which party should bear the burden of persuasion with respect to whether the claimed error was prejudicial. *See O'Neal v. McAninch*, 513 U.S. 432, 449-50 (1995) (Thomas, J., dissenting) (noting divergence between the Courts of Appeals on the issue).

As discussed in point I above, the Eighth Circuit's decision in this case now has injected further confusion into the oft-employed harmless error doctrine. By finding that instructional error was harmless merely because the jury *could* have applied proper (but refused) instructions to disputed evidence and reached the same verdict, the Eighth Circuit embraced a construct that contradicts the approach taken in other Circuits and threatens to unjustifiably expand the harmless error doctrine beyond any principled boundaries. Notably, the Eighth Circuit's flawed approach could be applied by courts in the future in both civil *and* criminal cases involving erroneous jury instructions. These circumstances impel review by and guidance from this Court on the issue.

Unquestionably, the Eighth Circuit's decision runs contrary to principles previously espoused by this Court:

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. *The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error.*

Kotteakos, 328 U.S. at 765 (emphasis added). *Cf. Neder v. U.S.*, 527 U.S. 1, 19 (1999) (recognizing that a refused instruction could *not* be deemed harmless if there was disputed evidence on the omitted issue). It is not the place of the appellate courts to speculate on how a jury would have applied disputed evidence in the absence of the challenged error. *Kotteakos*, 328 U.S. at 763-64. "[A] judge cannot possibly know or review what in the minds of the jurors led to the verdict." Capel, *supra*, at 516.

In short, this case demonstrates the compelling need for the Court, following these same principles, to set fundamental benchmarks for harmless error review of instructions in order to provide guidance for federal courts in all jury trials.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-2088 No. 02-2089

[Filed March 21, 2003]

Charles E. Emmenegger; Robert F. Ritzie; James E. Riley, Appellees/Cross-Appellants,	)
v.	)
Bull Moose Tube Company; Caparo, Inc.; Bull Moose Tube, Ltd., Appellants/Cross-Appellees.	)

Appeal from the United States District Court for the Eastern District of Missouri

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and RILEY, Circuit Judges.

OPINION: BOWMAN, Circuit Judge.

Bull Moose Tube Company; Caparo, Inc.; and Bull Moose Tube, Ltd. (collectively, the Company), appeal from

the judgment entered by the District Court[1] on a jury verdict in favor of Charles E. Emmenegger and Robert F. Ritzie on their claims for compensation related to a phantom-stock plan. The Company also appeals from the court's prejudgment interest award. Emmenegger, Ritzie, and James E. Riley cross appeal from the order awarding the Company partial cost of the supersedeas bond that the Company was required to post on the first appeal of this case. **We affirm**.

This is the second time this case has been before us, and we refer the interested reader to the previous published opinions, cited infra, for details of the relationship between the plaintiffs and the defendants. Briefly, in the first case, Emmenegger, Ritzie, and Riley, senior executives whose employment with the Company was terminated, sued the Company under ERISA[2] and state law seeking compensation under a phantom-stock plan (the PSP or the Plan) and their severance plans. The District Court determined that ERISA was properly invoked and dismissed the state law claims as preempted. After a bench trial, judgment was entered for Emmenegger, Ritzie, and Riley on all of their claims, *Emmenegger v. Bull Moose Tube Co.*, 13 F. Supp. 2d 980 (E.D. Mo. 1998), and attorney fees and costs were awarded to the plaintiffs, *Emmenegger v. Bull Moose Tube Co.*, 33 F. Supp. 2d 1127 (E.D. Mo. 1998).

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[1] The Honorable Catherine D. Perry, United States District Judge for the Eastern District of Missouri.

[2] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1994 & Supp. III 1997) and in scattered sections of 26 U.S.C.).

On appeal, the Company challenged the jurisdiction of the District Court under ERISA. We affirmed in part, concluding that the severance plans were indeed ERISA plans. (The Company did not appeal from the District Court's decision on the merits of the severance claims.) But we vacated the judgment as to the PSP claims, having determined that the PSP was not an ERISA plan, and dismissed the appeal for lack of subject-matter jurisdiction. We remanded the case to the District Court for further proceedings. *Emmenegger v. Bull Moose Tube Co.*, 197 F.3d 929 (8th Cir. 1999).

Back in the District Court, the plaintiffs recast the PSP claims as state law causes of action for breach of contract, and those claims were tried to a jury. The jury found for Emmenegger and Ritzie on a portion of their claims. Before us now are appeals from the District Court's denial of the Company's motions for judgment as a matter of law and for a new trial and from two post-judgment orders of the District Court.

I.

We review de novo the denial of a motion for judgment as a matter of law (JAML) after a jury trial, applying the same standard as the district court. *Fletcher v. Price Chopper Foods of Trumann, Inc.*, 220 F.3d 871, 875 (8th Cir. 2000). We look at the evidence in the light most favorable to the verdict, giving the non-moving party the benefit of all reasonable inferences. *Moring v. Ark. Dep't of Corr.*, 243 F.3d 452, 455 (8th Cir. 2001). We do not judge the credibility of witnesses or weigh the evidence. *Fletcher*, 220 F.3d at 875. In other words, we review the decision to deny the motion "with great deference to the jury's verdict." *Id.* As

for the denial of a motion for new trial, that decision is reviewed only for an abuse of discretion. *Moring,* 243 F.3d at 455. To win reversal, the moving party must show that the trial court's decision to deny the motion and let the verdict stand results in a miscarriage of justice. *Id.* Keeping these standards in mind, we consider the evidence before the jury.

Emmenegger, Ritzie, and Riley were employed as senior executives at Bull Moose Tube Company (BMT) when it was acquired in 1988 by Caparo, Inc., a closely-held company essentially owned by Lord Swraj Paul. Soon after Caparo took over, a phantom-stock plan was put in place, in which all three plaintiffs participated. As we observed in our first opinion, the PSP is "an incentive plan, which also has the objectives of furthering the interests of BMT and its owner, encouraging selected managers to stay with BMT, and 'compensating [those managers] for services rendered to' BMT." *Emmenegger*, 197 F.3d at 932 (quoting the PSP). Under the terms of the Plan, PSP shares are redeemed at either redemption value, which reflects the earnings performance of BMT, or the considerably lower book value. Book value is paid to a participant who leaves BMT "for any reason other than those set out in Subsection 8.1." Bull Moose Tube Co. Phantom Stock Plan § 8.2 (revised Feb. 21, 1991) (hereinafter Phantom Stock Plan). Under § 8.1 of the PSP, a participant may redeem his shares, once vested, for redemption value beginning five years after implementation of the program simply by making the request, and otherwise receives redemption value "upon the happening of certain triggering events, such as retirement, disability, death, termination without cause, or takeover." *Emmenegger,* 197 F.3d at 932. Termination of employment without cause is defined in the Plan as termination "for other than (i) willful or

gross misconduct or willful or gross negligence of his duties for the Corporations, (ii) intentional or habitual neglect of his duties for the Corporations or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony." Phantom Stock Plan at 8 (Definitions).

In 1994, PSP participant Dave Lichtfuss resigned from BMT and received book value for his sixty-six shares. Emmenegger and Ritzie, who together with Swraj Paul at that time constituted the Caparo, Inc., board, which administered the Plan, believed the board had authorized a redistribution of those shares, six to Emmenegger, nine to Ritzie, nine to Riley, and the rest to the remaining participants.

Things went well for BMT after it was acquired by Caparo, Inc., and the redemption value of the PSP shares skyrocketed. Notwithstanding this success, Emmenegger, Ritzie, and Riley all were terminated in March 1996, and Emmenegger and Ritzie were removed from the board.[3] The reconstituted board that decided Emmenegger and Ritzie were terminated "with cause" for purposes of PSP share redemption consisted of Paul, two of his sons, and two of his employees. At that time, Emmenegger owned 204 phantom shares and Ritzie and Riley each owned 66, not counting the redistributed Lichtfuss shares. Because of the transfer of his employment from BMT to Caparo Steel, Riley had been compelled to request redemption of his shares at the time of

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[3] As we explained in our first opinion, at the time of the terminations, Riley was a vice-president of Caparo Steel Company, a related corporation, and Emmenegger and Ritzie were devoting significant amounts of time to running Caparo Steel as well. *Emmenegger*, 197 F.3d at 930 n.3.

the transfer, before his termination, but had not yet been paid for those shares when he was fired. Indeed, none of the three plaintiffs was paid anything, not even book value, for his PSP shares initially. At some point after judgment was entered in the District Court following the first trial, Emmenegger and Ritzie finally were paid book value for their shares and Riley was paid redemption value for his shares according to the terms of the Plan (request for redemption while still employed).

As we have explained, Emmenegger, Ritzie, and Riley raised various claims under ERISA in their initial complaint. Upon remand, it having been determined there was no federal-question jurisdiction as to the PSP claims, Emmenegger and Ritzie amended their pleadings to allege state-law claims that the Company breached its contracts with them when it failed to pay them redemption value for their shares. (By this time the Company had paid Riley redemption value for his shares.) In addition, all three plaintiffs claimed breach of contract for the Company's failure to pay them for the redistributed Lichtfuss shares. The District Court determined it had jurisdiction to try the case.[4]

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[4] The District Court concluded it had supplemental jurisdiction over the plaintiffs' claims and exercised its discretion in asserting that jurisdiction in "the interests of judicial economy, convenience and fairness." Memorandum and Order at 2 (Mar. 30, 2001). We agree with the District Court's determination that it had supplemental jurisdiction over plaintiffs' state-law claims. *See* 28 U.S.C. § 1367 (2000). We have jurisdiction over this appeal under 28 U.S.C. § 1291 (2000).

After hearing all the evidence and upon deliberating, the jury answered "yes" to the interrogatory: "Did the Caparo, Inc. Board of Directors fail to engage in a 'reasonable exercise of its discretion in good faith' in determining" that Emmenegger and Ritzie were "terminated 'with cause'"? Verdict Form, questions 2, 3. The jury also found, however, that the redistribution of the Lichtfuss shares to the Plan's other participants was not authorized, and Emmenegger, Ritzie, and Riley's claims regarding the Lichtfuss shares were dismissed with prejudice, a decision from which the plaintiffs have not appealed.[5] Emmenegger was awarded damages of $ 3,621,244.80, plus interest, and Ritzie was awarded $ 1,171,579.20, plus interest. The Company asserts that the court erred in denying its motion for JAML and its motion for a new trial.

A.

The Company cites three actions of Emmenegger and Ritzie in arguing that the termination "with cause" was a reasonable exercise of the board's discretion in good faith. Primarily, it relies on the efforts of Emmenegger and Ritzie to effect a redistribution of the sixty-six Lichtfuss shares to the remaining PSP participants. Emmenegger and Ritzie testified that at a meeting of the Caparo, Inc., board (Emmenegger, Ritzie, and Paul), it was determined that the board had authority under the terms of the Plan to redistribute the shares and that in fact the board voted to do so. Paul

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[5] Because Riley's only claim in the second trial was for compensation for the redistributed Lichtfuss shares, he has no issues on appeal concerning the merits of the jury verdicts.

testified that he never agreed to the redistribution and that no action could be taken by the board unless he agreed, notwithstanding that the Plan neither required that votes of the board be unanimous nor provided that Paul could override a majority vote. The Company characterizes the actions of Emmenegger and Ritzie as gross or willful misconduct and misappropriation of the Company's funds. In addition to the dispute over the Lichtfuss shares, the Company briefly alludes to purported evidence of a real estate transaction that it claims involved self-dealing on the part of Emmenegger and to the alleged poor job performance of Emmenegger and Ritzie at Caparo Steel.[6] Based on these acts, the Company contends that the board reasonably exercised its discretion in good faith in deciding that Emmenegger and Ritzie were terminated with cause. As we have said, the jury found otherwise.

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[6] In its decision on the issue of severance benefits after the first trial of this case (the merits of which decision were not appealed), the District Court concluded:

> Defendants' explanation that they terminated Emmenegger and Ritzie for disciplinary reasons does not withstand even mild scrutiny. . . . Paul demonstrated his satisfaction with plaintiffs' performance by putting them in charge of the Caparo Steel project. It may well be that in taking on that challenge, plaintiffs overextended themselves. But it is hardly the case that Caparo Steel's problems were, in the main, of plaintiffs' doing. The evidence shows that problems continued to plague the company long after plaintiffs' departure.

Emmenegger, 13 F. Supp. 2d at 1002.

"A motion for judgment as a matter of law is a challenge to the sufficiency of the evidence." *Yannacopoulos v. Gen. Dynamics Corp.*, 75 F.3d 1298, 1302 (8th Cir. 1996). We have reviewed the record in this case mindful of our charge to view the evidence in the light most favorable to the verdict and to give Emmenegger and Ritzie the benefit of all reasonable inferences that may be drawn from the evidence. We conclude there is ample evidence to support the jury's finding that the board did not act reasonably or in good faith when it decided that Emmenegger and Ritzie were terminated with cause, that is, for willful or gross misconduct and misappropriation. The Company takes up much of its brief citing evidence that it claims supports its position in this appeal, but has ignored evidence to the contrary, including the evidence that the Company had a significant financial incentive to terminate Emmenegger and Ritzie "with cause" and thereby prevent them from receiving redemption value for their PSP shares. The jury apparently believed the plaintiffs' evidence on this point, and we cannot say that no reasonable juror could have returned a verdict for the plaintiffs. *See Moring*, 243 F.3d at 455. The District Court did not err in denying the Company's motion for JAML. Likewise, the District Court did not abuse its discretion in denying the motion for a new trial.

B.

As another basis for reversal, the Company contends that the verdict in favor of Emmenegger and Ritzie is inconsistent with the jury's finding that the redistribution of the Lichtfuss

shares was not authorized.[7] When presented with allegedly inconsistent verdicts on appeal, we must make every effort to bring them into agreement, "viewing the case in any reasonable way that makes the verdicts consistent." *Anheuser-Busch, Inc. v. John Labatt Ltd.*, 89 F.3d 1339, 1347 (8th Cir. 1996), *cert. denied*, 519 U.S. 1109, 136 L. Ed. 2d 833, 117 S. Ct. 944 (1997). Assuming without deciding that inconsistent verdicts in a civil case are grounds for JAML or a new trial, we nevertheless reject the Company's argument because we conclude that the verdicts in question here are easily reconciled and therefore not inconsistent with each other.

In finding for the Company on the issue of the Lichtfuss shares, the jury found any or all of three facts: that the Plan did not permit a redistribution; that the Caparo, Inc., board did not agree to a redistribution; and that the board failed to reach agreement on all matters necessary for redistribution, including a carrying value for the shares. See Instruction No. 7. But in order to find in favor of the Company on the Lichtfuss redistribution issue, the jury was **not** required to find that the efforts of Emmenegger and Ritzie to redistribute the Lichtfuss shares reflected gross or willful misconduct and misappropriation. On the evidence before it, the jury might easily have found that it should have been clear to the board

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[7] Emmenegger and Ritzie contend that the Company has waived this argument because it was not raised in the District Court. The Company responds that it was not required to raise the issue before the jury was discharged because the verdicts in question were special verdicts. Our resolution of the issue makes it unnecessary for us to consider Emmenegger and Ritzie's waiver argument.

that Emmenegger and Ritzie innocently misunderstood the Plan or the results of the board meetings relating to redistribution. In that case, the jury could also find, as it did, that the board therefore did not reasonably exercise its discretion in good faith when it determined that Emmenegger and Ritzie were fired with cause. The arguably inconsistent verdicts are reconcilable and are not grounds for reversal of the denial of the Company's motion for JAML or a new trial.

C.

The Company also argues that the District Court erred in refusing to give its proposed jury instructions explaining the meaning of "good faith" as that term is used elsewhere in the instructions and in the verdict form relating to the issue of termination with cause. The phrase was relevant to the jury's deliberations because the terms of the PSP give the board authority to administer the Plan "in the reasonable exercise of its discretion in good faith." Phantom Stock Plan at § 2.1. Nowhere in the Plan, however, is "good faith" explained or defined. The court agreed with Emmenegger and Ritzie that "good faith" likewise did not need to be defined for the jury and rejected the proposed instructions.

We review claims of error in instructions for abuse of discretion. *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 496 (8th Cir. 1998). Where the trial court elects not to give proposed instructions, we will find such an abuse only if the proposed instructions (1) correctly state the law, (2) concern a matter not otherwise covered by the charge to the jury, and (3) involve a point so important that the court's refusal to give the instructions "seriously impaired the party's ability to present an effective case." *Yannacopoulos,* 75 F.3d at 1303

(citations to quoted cases omitted). Because the Company's case was not impaired, that is, there was no prejudice to the Company from the District Court's rejection of the instructions, *see Cox,* 163 F.3d at 497, we do not consider elements (1) and (2).

The proposed instructions defined "good faith" as "the state of mind denoting honesty of purpose, freedom from intention to defraud, and faithfulness to one's duty or obligation." Proposed Instructions Nos. 9 Alt., 10 Alt. The Company asserts that "if the jury had been given this definition, and had it considered the Caparo board's actions within the framework of the question whether there was evidence of *dishonesty* or *intention to defraud*, the outcome of this case likely would have been different (inasmuch as there was *no* such evidence)." Brief of Appellants at 67. Even though the proposed definition does not set out the three "good faith" factors in the alternative, but apparently requires that a jury find of all of them if one is to prove good faith, the Company does not argue there was no evidence of the board's lack of faithfulness to "its duty or obligation." In any event, as we have discussed, we think there was ample evidence that the board did not act with "honesty of purpose" in firing Emmenegger and Ritzie with cause, given the Company's financial incentive to avoid paying the men redemption value for their PSP shares. The rejection of the tendered instructions explaining "good faith" was not an abuse of discretion and is not grounds for reversal.

II.

The District Court, stating that "I do not believe that Missouri law gives me any discretion to deny the requested

9% prejudgment interest from the time the payments were due until the date of this judgment," awarded $ 1,827,787.10 in prejudgment interest to Emmenegger and $ 576,898.49 in prejudgment interest to Ritzie. Memorandum Opinion at 2 (Dec. 19, 2001). The Company contends that the District Court erred in concluding that it had no discretion regarding the calculation and proposes that any award of prejudgment interest for the time during which the plaintiffs pursued their case under ERISA should be either denied altogether or calculated using the lower federal rates of prejudgment interest for that period.[8] We review de novo the question of law raised by the Company. Cf. *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 497 (8th Cir.) ("Whether the rate of prejudgment interest in a diversity case should be that specified by state law rather than the federal prejudgment rate is a question of law and should be reviewed *de novo*."), *cert. denied*, 534 U.S. 887, 151 L. Ed. 2d 139, 122 S. Ct. 198 (2001).

In a diversity case, the question of prejudgment interest is a substantive one, controlled by state law.[9] *See Swope,* 243

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[8] The District Court noted that "the federal judgment interest rate ranged between 5.5% and 6%" from the time payment was due until early 2001. Memorandum Opinion at 3 (Dec. 19, 2001). In its brief, the Company claims the applicable federal rate for the period is 2.17%. Brief of Appellants at 73. But 2.17% is actually the federal statutory post-judgment rate of interest as of the date of the District Court's order awarding interest. *See* Memorandum Opinion at 4 (Dec. 19, 2001).

[9] We recognize, of course, that the District Court took this case under its discretionary supplemental jurisdiction, see supra

F.3d at 497; *Happy Chef Sys., Inc. v. John Hancock Mut. Life Ins. Co.*, 933 F.2d 1433, 1435 (8th Cir. 1991). Under Missouri law, as relevant here, "creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made." Mo. Rev. Stat. § 408.020 (2000). "As a general rule, 'an award of prejudgment interest in a case where § 408.020 is applicable is not a matter of court discretion; it is compelled.'" *Springfield Land & Dev. Co. v. Bass,* 48 S.W.3d 620, 633 (Mo. Ct. App. 2001) (*quoting Huffstutter v. Mich. Mut. Ins. Co.*, 778 S.W.2d 391, 395 (Mo. Ct. App. 1989)).

Fundamentally, the Company is suggesting that the award should be adjusted to reflect equitable considerations. Considering the difference between the applicable federal and state rates of prejudgment interest in this case, and some of the reasons that this litigation has gone on for so long, the argument has some appeal. It is true that in some cases an award of prejudgment interest may be an equitable remedy. *Kerr v. Charles F. Vatterott &* Co., 184 F.3d 938, 945 (8th Cir. 1999) (considering an award of prejudgment interest in an ERISA case where the statute did not mandate an award but provided for the award of "other appropriate equitable relief"). But in this case, such interest is a legal remedy the award of which, Missouri state courts have declared, is not

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n.4, and so this is not a case where jurisdiction is based on diversity. Nevertheless, as in a diversity case, a federal court exercising supplemental jurisdiction is bound to apply the substantive state law governing the claims.

discretionary with the awarding court.[10] "Equitable principles of fairness and justice may not be considered when awarding prejudgment interest on a liquidated demand." *Huffstutter,* 778 S.W.2d at 395.

Section 408.020 does not allow for equitable adjustments but mandates prejudgment interest at the fixed rate of nine percent from the time payment is due. Under the statute, prejudgment interest in actions for breach of contract accrues "from the date of the breach or the time when payment was due under the contract," *Rich v. Peters,* 50 S.W.3d 814, 823 (Mo. Ct. App. 2001) (quoting *Wulfing v. Kansas City S. Indus., Inc.,* 842 S.W.2d 133, 160 (Mo. Ct. App. 1992)), not from the time when suit for breach of that contract was filed. To do as the Company suggests and order that no prejudgment interest be paid for the four years or so between the time the money was due and the time the complaint was amended after remand to assert state- law claims for breach of contract would frustrate the key purpose of prejudgment interest under Missouri law: "to compensate for the failure to pay a liquidated amount when due." *Prof'l Ins. Managers, Inc. v. RCA Mut. Ins. Co.,* 884 S.W.2d 332, 338 (Mo. Ct.

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[10] Interestingly, after the ERISA trial of this case (where the award of prejudgment interest was discretionary), the District Court declined to award the plaintiffs additional prejudgment interest in excess of the federal rate, in spite of the fact "that defendants have benefited from the 'spread'--the difference between the legal rate of pre-judgment interest due and the real value of having the use of plaintiffs' money for the past two years." *Emmenegger, 13 F. Supp. 2d at 1002.* The court saw "no legal basis" for such an award and refused "to exercise its equitable power in this way." *Id.*

App. 1994). The fact is, the Company owed Emmenegger and Ritzie redemption value for their PSP shares sixty days after they were fired, regardless of the missteps they made as they went about trying to collect their due.[11] The Company has had the benefit of money belonging to Emmenegger and Ritzie since 1996, and Emmenegger and Ritzie deserve to be compensated for their concomitant loss of use since that time.

Likewise, we find unavailing the argument that Emmenegger and Ritzie should be compensated at the lower federal rate of interest for the time they were pressing their claims under federal-question jurisdiction. The "proper function" of a federal court sitting in diversity "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941). It is not the place of the federal courts to question the rate of interest that the Missouri legislature has determined to be necessary to compensate creditors such as Emmenegger and Ritzie for the loss of the use of their money. Had the federal rate been higher than the state rate in this case, the District Court still would have been obligated to apply the state rate. It is not a matter of "how much"; it is simply a matter of being faithful to considerations of federalism and not tampering with the policy judgments made by a state where that state has the constitutional power to legislate. See *Erie R. Co. v. Tompkins,* 304 U.S. 64, 78, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

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[11] Under the terms of the PSP, the payment date for redeemed shares ordinarily was to be "sixty (60) days after any event requiring payment." Phantom Stock Plan at 6 (Definitions).

Because Missouri's prejudgment interest statute controls, it is of no consequence that the plaintiffs originally brought suit invoking the District Court's federal-question jurisdiction. The Company cites no authority to support its contention that we may ignore the legal nature of the plaintiffs' state-law claims for contract damages and prejudgment interest merely because plaintiffs originally sought compensation by incorrectly asserting claims based on federal law. In those cases to which the Company does direct our attention in support of its arguments, the federal courts in question, unlike the District Court here, had discretion regarding an award of prejudgment interest, that is, the issue of prejudgment interest in the first instance was an equitable one, not a legal one. E.g., *Bd. of County Comm'rs v. United States,* 308 U.S. 343, 352, 84 L. Ed. 313, 60 S. Ct. 285 (1939) (treaty); *Smith v. Am. Int'l Life Assurance Co.,* 50 F.3d 956, 958 (11th Cir. 1995) (ERISA); *NLRB v. W.L. Miller Co.,* 871 F.2d 745, 750 (8th Cir. 1989) (National Labor Relations Act); *In re Burlington N., Inc. Employment Practices Litig.,* 810 F.2d 601, 609 (7th Cir. 1986) (Title VII), *cert. denied*, 484 U.S. 821 (1987); *Kilpatrick Marine Piling v. Fireman's Fund Ins. Co.*, 795 F.2d 940, 947 (11th Cir. 1986) ("Admiralty courts have discretion in deciding prejudgment interest," even when the case is brought under diversity jurisdiction.).

We hold that the District Court properly awarded prejudgment interest to Emmenegger and Ritzie under Mo. Rev. Stat. § 408.020, that is, at nine percent from the time payment for the PSP shares was due them.

III.

After the first appeal, the Company moved this Court to tax as costs to the plaintiffs the supersedeas bond premiums the Company paid in order to prevent immediate execution of the first judgment. Citing Federal Rule of Appellate Procedure 39(e)(3),[12] we directed the Company to take its request to the District Court. The District Court deferred decision on the motion until after the merits of the PSP claims had been resolved. For their cross appeal, Emmenegger and Ritzie challenge the District Court's February 25, 2002, post-judgment order awarding the Company $ 146,432.00, which represents the cost of the supersedeas bond attributable to the ERISA judgment on their PSP claims. We review for abuse of discretion. *See United States ex rel. Costner v. United States,* 317 F.3d 889, 891 (8th Cir. 2003).

Emmenegger and Ritzie contend that they should not be taxed the bond premiums as costs, claiming they have prevailing party status not only for the first trial but also for the first appeal and the second trial. They contend that because the remand in the first appeal was "on a *procedural* issue" and because they were "significantly prevailing parties" on the merits in the second trial, they should not have to pay the cost of the premium for the bond that secured the first judgment even though that judgment ultimately was vacated. Brief of Appellees/Cross-Appellants at 71, 69.

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[12] "The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule: . . . (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal . . . ." Fed. R. App. P. 39(e)(3).

In support of their position, Emmenegger and Ritzie rely on *Berthelsen v. Kane,* 907 F.2d 617, 622-23 (6th Cir. 1990) (Order on Denial of Rehearing). In Berthelsen, the Sixth Circuit reversed entry of a default judgment and remanded the case for trial. The court explained that it would not decide at that time whether to award the bond premiums as costs, observing that although the judgment against the defendant was vacated, he had not yet prevailed on the merits. The court said, "In the event that [the defendant] should fail to prevail on the merits, then the appeal merely would have resulted in a further delay of the judgment to which the plaintiff was rightfully entitled." *Id.* Emmenegger and Ritzie would have us believe that the Berthelsen court was telling the district court that it must order the defendant to pay his own bond costs if he should lose on remand; they draw parallels with the situation here where the defendant Company prevailed on only a minor issue (the Lichtfuss shares). But in fact the Sixth Circuit was very explicit in leaving the decision to the discretion of the district court, as we did earlier in this case: "Pursuant to the provision of *Rule 39(e), the district court is free to determine* whether the premium paid on the supersedeas bond should be taxed as costs after there has been a determination on the merits of this case." *Id.* at 623 (emphasis added).

The question for us then is whether the District Court abused its discretion. The District Court cited Berthelsen when it deferred its decision on the bond until after the trial on the merits of the plaintiffs' state-law claims. As the court explained when it finally awarded bond costs to the Company, the court had wanted to know the outcome of the case because it certainly would have taxed the bond premiums as costs to the plaintiffs had the Company prevailed completely on

retrial. The plaintiffs are mistaken if they are inferring from that statement that any other result requires that the Company pay its own bond costs. The District Court always retained discretion to shift the cost of the supersedeas bond. In exercising that discretion, the court pointed out in its order that the Company would not have had to pay for a supersedeas bond in the first instance but for the plaintiffs' pursuit of their claims under the wrong legal theory. The court explained that although the plaintiffs primarily prevailed on remand, the Company's success in appealing the ERISA-based PSP judgment in the first trial resulted in a verdict against the Company in the second trial that was several million dollars less than in the first.

The District Court did not abuse its discretion in taxing the partial cost of the supersedeas bond premiums to the plaintiffs.

IV.

The District Court's denials of the Company's motions for JAML and for a new trial are affirmed. We affirm the order awarding prejudgment interest to Emmenegger and Ritzie and also affirm the order taxing to the plaintiffs the partial cost of the premiums that the Company paid for the supersedeas bond in the first appeal.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96CV1095 CDP

[Filed December 19, 2001]

Charles E. Emmenegger; et al., Plaintiffs,	)
v.	)
Bull Moose Tube Company; et al., Defendants.	)

MEMORANDUM OPINION

On December 4, 2001 the jury entered findings which entitled plaintiff Charles E. Emmenegger to a judgment in the principal amount of $3,621,244.80 and which entitled plaintiff Robert F. Ritzie to a judgment in the principal amount of $1,171,579.20. Judgment was not entered at that time so the parties could file briefs relating to prejudgment interest.

In 1996 plaintiffs brought these claims for recovery under the Phantom Stock Plan under the federal ERISA statute. Defendants consistently argued that the claims were not governed by ERISA, but I agreed with plaintiffs. Plaintiffs

obtained a judgment based on ERISA, but the Court of Appeals reversed, agreeing with defendants that ERISA did not govern this claim. After remand, plaintiffs filed their third amended complaint asserting state-law breach of contract, and that is the theory on which plaintiffs have now obtained verdicts and on which they are now entitled to judgment.

Missouri law sets the rate of prejudgment interest at 9% on liquidated contract claims. Mo. Rev. Stat. § 408.020. Plaintiffs seek 9% interest from May of 1996 when they claim the amounts were due them until the entry of judgment. Defendants agree that plaintiffs are entitled to the 9% rate from January 21, 2000, when they refiled their claims as state-law breach of contract claims. Defendants argue, however, that plaintiffs should not recover interest at the state rate for the approximately four-year period when plaintiffs were unsuccessfully pursuing the claims under federal law. Defendants urge that no interest be paid for this time period, or that, alternatively, only the federal interest rate should be paid during this time.

I do not believe that Missouri law gives me any discretion to deny the requested 9% prejudgment interest from the time the payments were due until the date of this judgment. Plaintiffs were owed the money under the Phantom Stock Plan beginning in 1996, and they were not paid. The amounts due were readily ascertainable, and therefore the Missouri statute applies.

Defendants correctly point out that the lengthy delay in reducing this amount to judgment was caused by the plaintiffs' litigation strategy. Defendants consistently argued that these were state claims, not federal claims. Although

there was nothing unreasonable about the litigation strategy, in that had plaintiffs been successful they would have recovered their attorneys fees in addition to prejudgment interest at the federal rate, it turned out to be an incorrect strategy, and therefore delayed plaintiffs' recovery. That delay is not attributable to defendants, who were entitled to defend against what ultimately was found to be an invalid claim.

Defendants, of course, had use of the money all this time, and the prejudgment interest statute is intended to compensate plaintiffs for that loss of use of money. Although the Missouri rate of 9% seems high in light of current interest rates, there have been times (the early 1980s, for example), when market rates exceeded 9%. From 1996 when this money came due until the beginning of 2001, the federal judgment interest rate ranged between 5.5% and 6%. Thus, paying no interest during the first phase of the litigation would grant defendants a windfall. The "middle ground" suggested by defendants- awarding plaintiffs the federal rate for the time they were asserting a federal claim - is simply not supported by any legal authority. Under all the circumstances, it is not necessarily unjust to award the 9% provided by Missouri law to plaintiffs.

I will therefore allow prejudgment interest to plaintiff Emmenegger from May 11, 1996, and to plaintiff Ritzie from July 1, 1996. The calculations contained in plaintiffs' brief are correct. Emmenegger's principal judgment amount is $3,621,244.80, the interest is $1,827,787.10, for a total judgment of $5,449,031.90. Ritzie's principal judgment amount is $1,171,579.20, plus interest of $576,898.49, for a total judgment of $1,748,477.69.

Post-judgment interest on all federal judgments accrues at the federal rate from the date of the judgment until paid. The current post-judgment interest rate is 2.17 %, and that is the post-judgment interest rate that applies here.

Plaintiffs seek an award of costs. Defendants previously sought an award of certain costs on appeal, and I denied that request without prejudice to be reraised after trial. I will not at this time award costs to either party, but both may, if they feel it is appropriate, file a bill of costs within the time set by local rule. If costs are then contested, I will rule on any issue presented.

A judgment in accord with this memorandum is entered this same date.

/s/_____
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 19th day of December, 2001.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96CV1095 CDP

[Filed January 7, 2002]

Charles E. Emmenegger; et al., Plaintiffs,	)
v.	)
Bull Moose Tube Company; et al., Defendants.	)

AMENDED JUDGMENT

Following jury trial of plaintiffs' Third Amended Complaint, the jury having duly rendered its verdicts on December 4, 2001, and in accordance with those verdicts and with the Memorandum and Order entered on December 19, 2001, and in accordance with the parties' stipulation regarding amending the judgment entered on December 19, 2001,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

On the claims of plaintiff Charles E. Emmenegger as set forth in Count I, Charles E. Emmenegger shall have judgment against defendants Bull Moose Tube Company, Caparo, Inc., and Bull Moose Tube, Ltd., jointly and severally, on plaintiff Emmenegger's claim for compensation for phantom shares not including the so-called Lichtfuss shares, in the amount of $5,449,031.90, which shall draw post-judgment interest at the federal rate of 2.17% from December 19, 2001 forward; and defendants Bull Moose Tube Company, Caparo, Inc. and Bull Moose Tube, Ltd. shall have judgment against Charles E. Emmenegger on his claim for compensation for the Lichtfuss shares, and plaintiff Emmenegger's claim with respect to the Lichtfuss shares is dismissed with prejudice; and

On the claims of plaintiff Robert F. Ritzie as set forth in Count II, Robert F. Ritzie shall have judgment against defendants Bull Moose Tube Company, Caparo, Inc., and Bull Moose Tube, Ltd., jointly and severally, on plaintiff Ritzie's claim for compensation for phantom shares not including the so-called Lichtfuss shares, in the amount of $1,748,477.69, which shall draw post-judgment interest at the federal rate of 2.17% from December 19, 2001 forward; and defendants Bull Moose Tube Company, Caparo, Inc. and Bull Moose Tube, Ltd. shall have judgment against Robert F. Ritzie on his claim for compensation for the Lichtfuss shares, and plaintiff Ritzie's claim with respect to the Lichtfuss shares is dismissed with prejudice; and

On the claim of plaintiff James E. Riley as set forth in Count III, defendants Bull Moose Tube Company, Caparo,

Inc. and Bull Moose Tube, Ltd. shall have judgment, and plaintiff Riley's claims are dismissed, in their entirety, with prejudice.

No costs shall be taxed against either party until further order of this Court, but both parties are allowed to file bills of costs, if they deem it appropriate.

/s/_____
CATHERINE D. PERRY
UNITED STATES DISTRICT JUDGE

Dated this 7th day of January, 2002.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96CV1095 CDP

[Filed February 25, 2002]

Charles E. Emmenegger; et al., Plaintiffs,	)
v.	)
Bull Moose Tube Company; et al., Defendants.	)

ORDER

This matter is before me on various post-trial matters. On December 4, 2001, the jury entered answers to special interrogatories which entitled plaintiffs to judgment on their claims in Counts I and II, and defendants to judgment on plaintiffs' claims in Count III. I entered judgment on December 19, 2001, as explained by the order and memorandum issued that date. By agreement of the parties, I entered an amended judgment on January 3, 2002.

Defendants now seek judgment as a matter of law or alternatively a new trial. They argue that the jury verdicts

granting plaintiffs Emmenegger and Ritzie the redemption value of their non-Lichtfuss shares lacked any evidentiary support, and alternatively seek a new trial on the grounds that the jury findings were against the weight of the evidence and were inconsistent and that I made certain instructional error.

I will deny the motion for judgment as a matter of law and for a new trial. In reflecting on the jury verdicts, I conclude that not only were the verdicts amply supported by the evidence, they were also right. When this case was first tried in a bench trial under different legal theories, I reached a different factual result with respect to the Lichtfuss shares. I reached the same general conclusion with respect to the non-Lichtfuss shares. Again, the legal theories and the standards were different, but now having heard essentially the same evidence twice, I believe the jury did a better job of sorting out the facts than I did the first time. I thus believe that the jury's result was factually well-supported by the evidence, and was not inconsistent in any way. For those reasons I will deny the motion for judgment as a matter of law and the alternative motion for new trial, to the extent it was based on the argument that the verdicts were inconsistent or against the weight of the evidence. To the extent the motion for new trial was based on instructional error, I will also deny it. I do not believe that the instructions or interrogatories were in error, and believe that when they are taken as a whole, they correctly stated the law and correctly posed the necessary questions to the jury.

Plaintiffs have filed a bill of costs seeking taxation of $2,112.32 in costs, consisting of costs for deposition transcripts, witness fees, and docket fees. Defendants have not objected to this Bill of Costs, and the costs are properly

taxable. I will therefore order the Clerk to tax them in plaintiff's favor.

Defendants have also filed a bill of costs, renewing their request that plaintiffs must bear the $146,432 partial cost of the supersedeas bond defendants had to post while this case was on appeal. In my order dated March 30, 2001, which I incorporate herein by reference, I discussed the law governing this request. The Court of Appeals in this case directed that I should decide the issue, and I decided to wait to see what happened at the retrial. I chose to wait because had defendants prevailed completely at the retrial, the decision would be easy, and I would tax the supersedeas bond. That did not happen, and plaintiffs prevailed at the retrial, although they did not prevail on all the issues.

Under all the circumstances of this case, I believe that defendants are entitled to have the supersedeas bond premiums taxed as costs, as they now seek. Defendants did prevail on the ERISA issue on appeal, which resulted in a judgment ultimately being entered that was several million dollars lower than what I had initially entered after the bench trial. Plaintiffs have been fully compensated for what was due them, including obtaining the prejudgment interest required by Missouri law. In theory at least, had plaintiffs initially cast their claim only under state law, instead of incorrectly claiming ERISA for the PSP claims, then this result would have been obtained several years earlier, and defendants would not have had to pay the supersedeas bond. The bond premium was necessary because plaintiffs incorrectly claimed ERISA for the PSP portion of their claims (and convinced me they were right. Defendants had to post the bond or pay the incorrect judgment, and this is rightfully the kind of cost that

the prevailing party should not have to pay. Since defendants were the prevailing party on that issue before the Court of Appeals, and since prevailing on that issue in fact saved defendants from paying several million dollars thatwas incorrectly awarded to plaintiffs after the first trial, taxation of these costs to plaintiff is appropriate.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for judgment as a matter of law or for new trial [#400-1,400-2] is denied.

IT IS FURTHER ORDERED that the plaintiffs' objections to defendants' bill of costs for supersedeas bond on appeal is denied.

IT IS FURTHER ORDERED that the Clerk shall tax as costs payable by defendants the amount of $2,212.32 as claimed in plaintiffs' bill of costs [#402] and shall tax as costs payable by plaintiff the amount of $146,432.00 as claimed in defendants' bill of costs [#401].

Dated this 25th day of February, 2002.

/s/_____
CATHERINE PERRY
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-2088 No. 02-2089

[Filed April 30, 2003]

Charles E. Emmenegger; Robert F. Ritzie; James E. Riley, Appellees/Cross-Appellants,	)
v.	)
Bull Moose Tube Company; Caparo, Inc.; Bull Moose Tube, Ltd., Appellants/Cross-Appellees.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian did not participate in the vote on the petition for rehearing en banc. (5128-010199)

Order Entered

/s/_____
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:96CV1095 CDP

[Filed December 4, 2001]

Charles E. Emmenegger; Robert F. Ritzie; James E. Riley, Plaintiffs,	)
v.	)
Bull Moose Tube Company; Caparo, Inc., and Bull Moose Tube, Ltd., Defendants.	)

VERDICT

Note: Complete this form reflecting your verdicts by answering these questions:

1. Was a redistribution of the Lichtfuss shares authorized in April of 1994?

_____ yes ____X____ no

2. Did the Caparo, Inc. Board of Directors fail to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Charles E. Emmenegger was terminated "with cause," as that term is defined in these instructions?

____X____ yes _____ no

3. Did the Caparo, Inc. Board of Directors fail to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Robert F. Ritzie was terminated "with cause," as that term is defined in these instructions?

____X____ yes _____ no

Foreperson:
/s/_____

Date: ___12/04/01___

APPENDIX G

INSTRUCTION NO. 8 [GIVEN]

Question number 2 asks whether the Caparo, Inc. board of Directors failed to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Charles E. Emmenegger was terminated "with cause" as that term is used in the Phantom Stock Plan.

"Termination of Employment With Cause" is defined as discharge of a Participant by the Corporations, for"(i) willful or gross misconduct or willful or gross negligence of his duties for the Corporations, (ii)intentional or habitual neglect of his duties for the Corporations or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony."

For this purpose, the Plan defines the "Corporations" solely as Bull Moose Tube Company and Bull Moose Tube, Ltd.

APPENDIX H

INSTRUCTION NO. 9 [GIVEN]

Question number 3 asks whether the Caparo, Inc. board of Directors failed to engage in a "reasonable exercise of its discretion in good faith" in determining that plaintiff Robert F. Ritzie was terminated "with cause" as that term is used in the Phantom Stock Plan.

"Termination of Employment With Cause" is defined as discharge of a Participant b the Corporations, for"(i) willful or gross misconduct or willful or gross negligence of his duties for the Corporations, (ii) intentional or habitual neglect of his duties for the Corporations or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony."

For this purpose, the Plan defines the "Corporations" solely as Bull Moose Tube Company and Bull Moose Tube, Ltd.

APPENDIX I

INSTRUCTION NO. 9 Alt [REFUSED]

The second question asks whether you find that the Caparo, Inc. Board of Directors failed to exercise its discretion reasonably and in good faith in determining that the termination of Emmenegger's employment was, in part, with cause, as defined in the Phantom Stock Plan.

Termination "with cause" is defined as discharge of a participant in the Phantom Stock Plan by the Corporations, for (i) willful or gross misconduct or willful or gross negligence of his duties for the Corporations, (ii) intentional or habitual neglect of his duties for the Corporations, or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony.

The Phantom Stock Plan defines the "Corporations" as Bull Moose Tube Company and Bull Moose Tube, Ltd.

"Good faith," as used in this instruction, means the state of mind denoting honesty of purpose, freedom from intention to defraud, and faithfulness to one's duty or obligation.

Submitted by Defendants

State of Missouri v. Russell, 45 S.W.3d 487, 497 (Mo. App. 2001).

APPENDIX J

INSTRUCTION NO. 10 Alt [REFUSED]

The third question asks whether you find that the Caparo, Inc. Board of Directors failed to exercise its discretion reasonably and in good faith in determining that the termination of Ritzie's employment was, in part, with cause, as defined in the Phantom Stock Plan.

Termination "with cause" is defined as discharge of a participant in the Phantom Stock Plan by the Corporations, for (i) willful or gross misconduct or willful or gross negligence of his duties for the Corporations, (ii) intentional or habitual neglect of his duties for the Corporations, or (iii) theft or misappropriation of the Corporations' funds or the commission of a felony.

The Phantom Stock Plan defines the "Corporations" as Bull Moose Tube Company and Bull Moose Tube, Ltd.

"Good faith," as used in this instruction, means the state of mind denoting honesty of purpose, freedom from intention to defraud, and faithfulness to one's duty or obligation.

Submitted by Defendants

State of Missouri v. Russell, 45 S.W.3d 487, 497 (Mo. App. 2001).